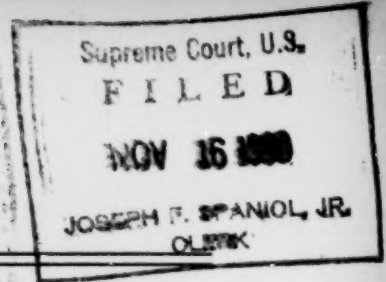


90-775

No.



**In the Supreme Court**  
**OF THE**  
**United States**

**OCTOBER TERM, 1990**

**HIPOLITO RIVERA-RAMIREZ,**  
***Petitioner,***

**vs.**

**UNITED STATES OF AMERICA,**  
***Respondent,***

**PETITION FOR WRIT OF CERTIORARI TO THE**  
**UNITED STATES COURTS OF APPEALS**  
**FOR THE NINTH CIRCUIT**

**For the Petitioner:**  
**HIPOLITO RIVERA-RAMIREZ**  
**P.O. Box 3007**  
**San Pedro, CA 90731**  
***In Propria Persona***

**November 12th, 1990**



## **QUESTIONS PRESENTED FOR REVIEW**

- I. DID FEDERAL JUDGES JUDICIALLY CREATE THEIR OWN CONSECUTIVE SENTENCING PROVISIONS PRIOR TO PASSAGE OF THE COMPREHENSIVE CRIME CONTROL ACT OF 1984 THAT FOR THE FIRST TIME GAVE EXPRESSED STATUTORY AUTHORITY TO RUN A PRISON TERM CONSECUTIVE TO ANOTHER SENTENCE UPON ANY FEDERAL CONVICTION IN VIOLATION OF THE U.S. CONSTITUTION?**
  
- II. CAN A CONSECUTIVE TERM OF IMPRISONMENT BE IMPOSED FOR INVOLVEMENT IN A SINGLE CRIMINAL UNDERTAKING THAT EXCEEDS THE MAXIMUM TERM ALLOWED FOR THE PRINCIPAL CRIMINAL SCHEME?**

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No. \_\_\_\_\_

# **In the Supreme Court**

OF THE

**United States**

OCTOBER TERM, 1990

**HIPOLITO RIVERA-RAMIREZ,**  
*Petitioner,*

v.

**UNITED STATES OF AMERICA,**  
*Respondent.*

## **PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE NINTH CIRCUIT**

The Petitioner, Hipolito Rivera-Ramirez, appearing before the Court *in propria persona*, respectfully prays that a Writ of Certiorari issue to review the judgment of the U.S. Court of Appeals for the Ninth Circuit entered on August 20th, 1990.

### **OPINION BELOW**

The Court of Appeals entered its judgment affirming the U.S. District Court's denial of a Motion To Correct An Illegal Sentence filed pursuant to Rule 35(a), Federal Rules of Criminal Procedure. A copy of the judgment is annexed hereto as Appendix A.

## **JURISDICTIONAL STATEMENT**

The decision made by the Court of Appeals affirming the U.S. District Court's denial of the Motion To Correct An Allegal Sentence constituted a final judgment. Jurisdiction under 28 U.S.C. S1254(1) is hereby invoked for review of the decision entered by the U.S. Court of Appeals for the Ninth Circuit on August 20th, 1990.

## **CONSTITUTIONAL PROVISIONS STATUTES AND RULES**

**Article I, Section 1, U.S. Constitution:**

All legislative powers herein granted shall be vested in a Congress of the United States....

**Article III, Section 1, U.S. Constitution:**

The judicial power shall extend to all cases, in law and equity, arising under this Consitution, the laws of the United States, and treaties made, or which shall be made, under their authority....

**Fifth Amendment, U.S. Constitution:**

nor be deprived of life, liberty, or property without due process of law....

**Eighth Amendment, U.S. Constitution:**

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

**Title 18 U.S.C. S924(c):**

nor shall any term of imprisonment imposed under this subsection run concurrently with any term of imprisonment imposed for the commission of such felony.

**Title 18 U.S.C. S3584(a):**

If multiple terms of imprisonment are imposed on a defendant at the same time, or if a term of imprisonment is imposed on a defendant who is already subject to an undischarged term of

imprisonment, the terms may run concurrently or consecutively, except that the term may not run consecutively for an attempt and for another offense that was the sole object of the attempt. Multiple terms of imprisonment imposed at the same time run concurrently unless the court orders or the statute mandates that the terms are to run consecutively. Multiple terms of imprisonment imposed at different times run unless the court orders that the terms are to run consecutively.

**Title 21 U.S.C. 841(b)(1)(A):**

Except as otherwise provided in section 845 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

In the case of a controlled substance in schedule I or II which is a narcotic drug, such person shall be sentenced to a term of imprisonment of not more than 15 years, a fine of not more than \$25,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marijuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 30 years, a fine of not more than \$50,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such prior conviction, impose a special parole term of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 6 years in addition to such term of imprisonment.

**Title 21 U.S.C. §846:**

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

Rules 35(a), Federal Rules of Criminal Procedure:

The court may correct an illegal sentence at any time....

### STATEMENT OF THE CASE

Dual questions concerning multiple sentences imposed upon the Petitioner in a consecutive manner are raised in this proceeding. First, it is argued herein that prior to legislative enactment of The Comprehensive Crime Control Act Of 1984, specifically the sentencing provision codified at 18 U.S.C. S3584(a) (1984), Federal judges had absolutely no statutory authority to impose consecutive sentences unless Congress gave such authority within the language of a sentencing statute. Thus, it is asserted that prior to 1984 Federal judges "*judicially created*" consecutive sentencing provisions upon any criminal conviction absent statutory authority, and that Title 21 U.S.C. S841(b) (1) (A) and S846 contains no provision authorizing imposition of consecutive sentences. Secondly, it is argued herein that Petitioner was involved in a single, continuous criminal undertaking to distribute illegal narcotics, thus only one term of imprisonment not to exceed a 15-year maximum penalty was the only lawful sentence that could be imposed. Both issues were initially presented to the U.S. District Court for the Central District of California, which had jurisdiction to hear the legal challenge under Rule 35(a), Federal Rules Of Criminal Procedure, in that an illegal sentence may be corrected at any time.

Petitioner was convicted upon his plea of guilty to violations charged under 21 U.S.C. S841(a) (1) and S846. The U.S. District Court imposed two, separate 15-year terms ordering that the second term be consecutive to the first for a total sentence of 30 years. The sentences were imposed in 1981 at a single trial.

### REASONS FOR GRANTING THE WRIT

- I. Federal judges judicially created their own consecutive sentencing provisions prior to passage of the comprehensive crime control act of 1984 that for the first time gave expressed

statutory authority to run a prison term consecutive to another sentence upon any federal conviction.

At the outset, the U.S. Court of Appeals for the Ninth Circuit has decided the above question of federal law, which has not been, but should be settled by this Court. The paramount implications here are clearly that prior to enactment of 18 U.S.C. §3584(a) (1984), "*no general consecutive sentencing authority existed under U.S. law.*" Thus, unless Congress specifically spoke within a sentencing or penalty statute, authorizing a consecutive term of imprisonment, Petitioner's sentence and all other similarly imposed sentences prior to implementation of 18 U.S.C. §3584(a) were illegally imposed. If that assertion is proven to be true, the national significance of this case is suggested to be overwhelming and the need for clarification essentially appropriate. The effect of the Court's ruling will not necessarily touch post-§3584(a) sentences whereas Congress created a consecutive sentencing statute, however, most "*old-law*" sentences that were imposed consecutively will be at issue. Given the gravamen of the argument presented herein, Petitioner's question is ripe for determination.

The issue of consecutive sentences is not new to this Court. In fact, this Court has upheld the practice of imposing consecutive or cumulative terms in many cases, or at least discussed multiple sentences from various points of view. E.g., *Albernaz v. United States*, 450 U.S. 333, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981); *Whalen v. United States*, 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980); *Brown v. Ohio*, 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977); *Iannelli v. United States*, 420 U.S. 770, 95 S.Ct. 1284, 43 L.Ed.2d 616 (1975); *Callanan v. United States*, 364 U.S. 587, 81 S.Ct. 321, 5 L.Ed.2d 312 (1961); *Gore v. United States*, 357 U.S. 386, 78 S.Ct. 1280, 2 L.Ed.2d 1405 (1958); *Bell v. United States*, 349 U.S. 75 S.Ct. 620, 99 L.Ed.2d 905 (1955); *Pereira v. United States*, 347 U.S. 1, 74 S.Ct. 358, 98 L.Ed. 435 (1954); *Pinkerton v. United States*, 328 U.S. 640, 66 S.Ct. 1180, 90 L.Ed. 1489 (1946); *American Tobacco Co. v. United States*, 328 U.S. 781, 66 S.Ct. 1125, 90 L.Ed. 1575 (1946); *Braverman v. United States*, 317 U.S. 49, 63 S.Ct. 99, 87 L.Ed. 23 (1942); *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed.306 (1932);

**Albrecht v. United States**, 273 U.S. 1, 47 S.Ct. 250, 71 L.Ed. 505 (1930); **Ebeling v. Morgan**, 237 U.S. 625, 35 S.Ct. 710, 59 L.Ed. 1151 (1915); **Clune v. United States**, 159 U.S. 590, 16 S.Ct. 125, 40 L.Ed. 269 (1895); **Ex parte Snow**, 120 U.S. 274, 7 S.Ct. 556, 30 L.Ed. 658 (1887).

Unfortunately, the Court did not discuss "*where*" judicial authority originated that would allow imposition of consecutive terms, except to judicially fashion "*a rule*" in **Blockburger**, *supra*, that if each charge requires proof of fact that the other does not, multiple or cumulative punishments are authorized by Congress. The rationale behind permitting consecutive terms of imprisonment has generally been that if each crime charged carries its own penalty provision, Congress intended for U.S. courts to impose individual sentences. **Albernaz v United States**, *supra*. In any event, in all cases examined by this Court, to date, the roots of consecutive or cumulative sentences has never been revealed.

This Court has traditionally read criminal statutes enacted by Congress "*in the light of the common law.*" **Morisette v. United States**, 342 U.S. 246, 262-263, 72 S.Ct. 240, 96 L.Ed. 288 (1985); **United States v. Carll**, 105 U.S. 611, 26 L.Ed. 1135 (1882). An examination of English law has been taken in many cases, American law deriving from English standards. E.g., **Callanan v. United States**, *supra*; **Peyton v. Rowe**, 391 U.S. 54, 66 (1968). English judges had no power to impose cumulative punishments in felony cases and did not assume such power in misdemeanor cases until 1769. **Regina v. Albury**, 1 All E.R. 491 (1951) (Crim App); I J. Stephen, *History of the Criminal Law of England*, 291-292 (1883) (cited in **Peyton v. Rowe**, 391 U.S. at 66). It is relatively clear that no common-law powers exist to impose sentences fixed by Congress.

In fact, it is well-settled that the constitutional authority to define and fix punishments for criminal conduct is legislative. **Ex parte United States**, 242 U.S. 27, 42, 37 S.Ct. 72, 61 L.Ed. 129 (1916); **United States v. Wiltberger**, 5 Wheat 76, 95, 5, L.Ed. 37; **United States v. Hudson and Goodwin**, 7 Cranch 32, 34, 3 L.Ed. 259; Article I, Section 1, U.S. Constitution. Congress may not delegate its

power to fix specific sentences] to another Branch of government. *Field v. Clark*, 143 U.S. 649, 692 (1892). Thus, in the absence of specific statutory language permitting U.S. courts authority to impose consecutive terms of imprisonment, courts may not infer what Congress has commanded, for to do so would permit courts to legislate on their own.

In 1984, Congress for the first time enacted its statutory provision permitting U.S. courts to impose consecutive terms of imprisonment, creating 18 U.S.C. §3584(a). In creating the statute, Congress conceded that no similar statute ever existed:

**"There are no provisions of current law covering the contents of this section."** [Comprehensive Crime Control Act Of 1984, Legislative History, Pub.L. 98-473, p. 129 October 12th, 1984] [Emphasis added]

Prior to 1984, Congress had some idea about consecutive terms of imprisonment. E.g., in 1981, Congress directed in creation of 18 U.S.C. §924(c), that:

**"[n] or shall any term of imprisonment imposed under this subsection run concurrently with any term of imprisonment imposed for the commission of such felony."**

Although it is not entirely clear where Congress' idea of consecutive sentencing originated, seeing that it cannot be found derivative from English Law in '*felony cases*,' when Congress commanded that a sentence be imposed in a '*consecutive manner*,' it spoke through the sentencing provision, permitting U.S. courts the authority to sentence in a consecutive or cumulative manner.

In the instant case, where did the District Court obtain its power to impose a consecutive term of imprisonment in this '*felony*' case? This Court has already decided that a sentencing court possesses '*no inherent powers*' in sentencing matters. *Ex parte United States*, *supra*.

The legal premise that sentencing is not inherently or exclusively a judicial function was discussed in **Geraghty v. United States Parole Commission**, 719 F.2d 1199 (3rd Cir 1983). Article III courts are only empowered to follow what Congress has enacted. Equally clear is that prior to the 1984 enactment of 18 U.S.C. §3584(a), U.S. courts had no '*discretionary powers*' in fixing consecutive sentences. Indeed, the concept of whether a sentence be imposed concurrently or consecutively to another Federal sentence was '*judicially created*'; e.g., cf. **United States v. Adair**, 681 F2d 1150 (9th Cir 1980) [adhering to the legal principle that all sentences are concurrent unless ordered to be consecutive]. At issue here, of course, is the origination point of where a sentencing court obtained its power to decide whether or not a sentence be made concurrent or consecutive.

In light of the fact that Congress did not create 18 U.S.C. §3584(a) until 1984, it can be stated in certain terms that '*no statutory authority existed*' in 1981 to sentence Petitioner to a consecutive term of imprisonment, whether the sentence be thought to be imposed mandatorily or with discretion. Any considerations of the authority granted U.S. courts in 1984 cannot be applied to Petitioner in 1981 without triggering '*ex post facto*' problems. **Dobbert v. Florida**, 432 U.S. 282 (1977). Examining Petitioner's sentences of 15 years and 15 years, consecutive, against the backdrop of 18 U.S.C. §3584(a), it is lucid that ambiguity now becomes a focal point of the sentencing process regardless of the past-examinations conducted on the lawfulness of consecutive or cumulative punishments inflicted by U.S. courts. In **Bifulco v. United States**, 447 U.S. 381 (1980), this Court stated that the "*rule of lenity*" applies to situations where ambiguity is present, and that the rule is a principle of statutory construction which applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose. The Court quoted from **Ladner v. United States**, 358 U.S. 169 (1968), stating that:

"The policy of lenity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such

an interpretation can be based on no more than a guess as to what Congress intended."

[Bifulco, 447 U.S. at 387]

This Court should grant the instant Petition in order to resolve the visible conflict presented by the creation of 18 U.S.C. §3584(a) and the absence of previous statutory authority, none of which can be found in 21 U.S.C. §841(b) (1) (A), nor in 21 U.S.C. §846, that permitted imposition of a consecutive sentence. Nor is the answer found in the History Of The Criminal Code, codified at 18 U.S.C.A. 4121 to end, pp. 440-441; p. 449, Legislative History (1985). This important question of law is currently ripe for the Court's determination as the question of whether or not Petitioner is serving an illegal sentence has been squarely placed before this Court.

II. A CONSECUTIVE TERM OF IMPRISONMENT IMPOSED FOR INVOLVEMENT IN A SINGLE CRIMINAL UNDERTAKING THAT EXCEEDS THE MAXIMUM TERM ALLOWED FOR THE PRINCIPAL CRIMINAL SCHEME IS ILLEGAL.

Petitioner was arrested for distribution of illegal narcotics and charged with both conspiracy to distribute narcotics under 21 U.S.C. §846, along with possession with intent to distribute in violation of 21 U.S.C. §841(a) (1). Multiple conspiracies were not charged as this Court examined in *Albernaz v. United States*, *supra*, which would invoke the rule announced in *Blockburger v. United States*, *supra*, 1/ Petitioner argued in the Court of Appeals that he was involved in '*one continuous criminal scheme*' to distribute narcotics, and that there was never any deviation from that single scheme warranting additional sentences. The Court of Appeals relied upon the fact that Petitioner participated in a criminal conspiracy over an eight month

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1/ Petitioner continues his position argued in the first section of this Petition that *Blockburger* does not provide the necessary statutory authority for the imposition of consecutive sentences.

period which involved many separate transactions and individuals. [Appendix A-3] However, it is contended here that the Court of Appeals never found Petitioner to have ventured outside of the scheme to distribute illegal narcotics, that would have warranted an additional prosecution and prison term. *Prince v. United States*, 352 U.S. 322, 77 S.Ct. 403, 1 L.Ed.2d 370 (1957); *Ex parte Snow*, 120 U.S. 274, 7 S.Ct. 556, 30 L.Ed. 658 (1887).

The penalty provision for violation of 21 U.S.C. §841(a) (1) is determined by examination of §841(b) (1) (A):

In the case of a controlled substance in schedule I or II which is a narcotic drug, such person shall be sentenced to a term of imprisonment of not more than 15 years, a fine of not more than \$25,000, or both....  
[Emphasis added]

Petitioner was charged with distribution of "cocaine", a narcotic drug as defined by statute. The sentence of imprisonment for his conduct should have been no more than a maximum 15-year term. His conspiracy and distribution was part of the on-going criminal scheme; in fact, he could not distribute without conspiring to do so in the magnitude he was charged by government. Thus, there was but a single agreement to violate laws of the United States. See: *Gavieres v. United States*, 220, U.S. 338 (1931).

Even should the Court agree with the Court of Appeals that Petitioner could be sentenced separately for the conspiracy and the distribution, the total term of Petitioner's imprisonment cannot exceed the 15-year maximum penalty. This Court is asked to review the decision made by the Court of Appeals and the failure to find that Petitioner ever deviated from the continuous criminal scheme, and whether the excessive, consecutive term violates the Fifth and Eighth Amendments to the U.S. Constitution.

## **CONCLUSION**

It is respectfully prayed that the Court determine the foregoing Petition is worthy of review and that further proceedings and briefings be ordered in aid of the Court's final determinations on the issue of whether or not consecutive sentencing in felony cases has been judicially created when not commanded by law.

Respectfully submitted,

Hipolito Rivera- Ramirez  
In Propria Persona

---

Hipolito Rivera-Ramirez  
P.O. Box 3007  
San Pedro, CA 90731

United States of America, )  
 ) No. 88-5444  
Plaintiff-Appellee, )  
 ) D.C. No CR-81-0908-TJH-1

HIPOLITO RIVERA-RAMIREZ, ) MEMORANDUM\*  
aka: Humberto, aka: HTO,  
aka: Emilio Cadiz,

**Appeal from the United States District Court  
for the Central District of California  
Terry J. Hatter, Jr., District Judge, Presiding**

Exhibit A

**FILED**  
**AUGUST 20, 1990**  
**CATHY A. CATTERSON, CLERK**  
**U.S. COURT OF APPEALS**

**FACTS AND PROCEEDINGS**

On November 16, 1981, Rivera pleaded guilty to one count of conspiracy to possess and distribute cocaine in violation of 21 U.S.C. §846, and to one count of possession of cocaine with the intent to distribute in violation of 21 U.S.C. §841 (a) (1). On January 19, 1982, Rivera was sentenced to the maximum sentence of fifteen years imprisonment for each count, to be served consecutively, for a total of thirty years. See 21 U.S.C. §841 (b) (1) (A). Rivera was also sentenced to a \$25,000 fine, plus a special parole term of life on the possession count.

On November 19, 1987, Rivera filed a motion under Fed. R. Crim. P. 35 (a) to correct the sentence, alleging that the imposition of consecutive sentences was illegal. At the time Rivera was sentenced, Rule 35 (a) provided that "[t]he court may correct an illegal sentence at any time..." The district court entered an order denying Rivera's motion on November 23, 1988. This timely appeal followed.

**DISCUSSION**

Rivera raises two arguments on appeal: (1) that his criminal conduct constituted one continuous scheme to which only a single term of imprisonment is authorized; and (2) that absent express statutory authorization, the imposition of consecutive sentences is unlawful.

**I. SINGLE CRIMINAL UNDERTAKING**

Rivera contends that *United States v. Palafox*, 764 F.2d 558 (9th Cir. 1985) (en banc), prohibits the imposition of separate sentences for conspiracy to possess and distribute cocaine and possession of cocaine with the intent to distribute. In *Palafox*, we held

that where the defendant distributes a sample [of a controlled substance] and retains the remainder for the purpose of making an immediate distribution to the same recipients at the same place and at the same time, verdicts of guilty may be returned on both counts [of distribution and possession with the intent to distribute] but the defendant may be punished on only one.

*Id.* at 560 (footnote omitted). We reasoned "that where the defendant is convicted of multiple criminal steps leading to same criminal undertaking, only one punishment should be imposed." *Id.* at 563. See also *United States v. Wilson*, 781 F.2d 1438, 1439 (9th Cir. 1986) (per curiam) (possession of piperidine and the manufacture of PCC were only "successive stages of a single criminal undertaking," that being the attempted manufacture of PCP).

The rulings of *Palafox* and *Wilson* are inapplicable in this case. Unlike *Palafox* where the "multiple criminal steps" leading to a single transaction occurred with the same people at the same time and place, Rivera participated in a criminal conspiracy over an eight month period which involved many separate transactions and individuals.<sup>1</sup> See *United States v. Rodriguez-Ramirez*, 777 F.2d 454 (9th Cir. 1985) (imposition of concurrent sentences for distribution of sample and possession of remainder for distribution two days later upheld).

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<sup>1</sup> The evidence presented at trial established that Rivera and six others organized and implemented a very large-scale drug distribution scheme, which included the hiring of distributors to sell the cocaine, plus the renting of four apartments where the cocaine was stored and the proceeds from the drug sales counted and received. Upon the search of the apartments, the police discovered 113.5 pounds of cocaine and approximately \$2,000,000 in currency. They also seized a money-counting machine, weapons, and ledgers in which the details of the operation were recorded. The ledgers revealed distribution of over 3,600 pounds of cocaine, which yielded \$73,000,000. The ledgers indicated that Rivera had personally distributed cocaine to local dealers and had also traveled to Miami on several occasions to obtain cocaine.

Nor do we have merely successive steps in a single criminal undertaking as in *Wilson*. Rather, we have distinct criminal acts. The well-established rule is that a conspiracy to do an act and the completed substantive offense are distinct crimes for which separate sentences may be imposed. See *United States v. Wylie*, 625 F.2d 1371, 1381 9th Cir. 1980) (conspiracy to distribute and distribution may be punished consecutively), cert. denied, 449 U.S. 1080 (1981); *United States v. Batimana*, 623 F.2d 1366, 1370 (9th Cir.) (conspiracy to possess with intent to distribute and possession with intent to distribute punished consecutively), cert. denied, 449 U.S. 1038 (1980).

## II. Statutory Authorization and Consecutive Sentences

Rivera next argues that the district court was not permitted to impose consecutive sentences absent express statutory authorization, which did not exist until 1984.<sup>2</sup> We disagree.

A court may impose consecutive sentences absent express authorization where it is clear Congress intended that two statutory offenses be punished cumulatively. See *Albernaz v. United States*, 450 U.S. 333 (1981). Where the same act or transaction constitutes a violation of two distinct statutory provisions, the inquiry as to whether separate punishment may be imposed turns on "whether each provision requires proof of a fact which the other does not." *Id.* at 337 (quoting *Blockburger v. United States*, 284 U.S. 299, 304 (1932)).

We concluded in *Wylie* "that Congress did intend to allow the courts to impose consecutive sentences for conspiracy (21 U.S.C. § 846), and for substantive offenses (21 U.S.C. § 841 (a) (1))." 625 F.2d at 1382. We noted that a substantive charge and a conspiracy charge based on the substantive charge are separate offenses under the *Blockburger* test because each requires proofs of facts the other does not — conspiracy requires proof of an agreement while conviction on the substantive charge requires consummation of the crime. *Id.* at 1381;

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<sup>2</sup> Enacted in 1984, 18 U.S.C. § 3584 (a) provides that, with one exception not relevant here, the court may impose terms of imprisonment to "run concurrently or consecutively."

**United States v. Rubalcaba**, 811 F.2d 491,495 (9th Cir.), cert. denied, 484 U.S. 832 (1987). We also found nothing in the Comprehensive Drug Abuse Prevention and Control Act of 1970, of which sections 846 and 841 (a) (1) are a part, or in the legislative history "which would indicate that Congress intended to depart from the general rule that courts can impose separate sentences for the conspiracy to commit an offense and the accomplishment of the substantive offenses itself." **Wylie**, 625 F.2d at 1381.

We find the rule of lenity established in **Bifulco v. United States**, 447 U.S. 381 (1980), to be inapplicable in this case. "[T]he touchstone of the rule of lenity is statutory ambiguity," **Albernaz**, 450 U.S. 342 (quotation omitted), and none exists in this case. Rather, we are presented with clear statutory language and a legislative history which provides "'persuasive evidence that, because of the special dangers which conspiracies to distribute controlled drugs pose to society,'" Congress intended to impose dual punishments for violations of section 841 (a) (1) and 846. **Wylie**, 625 F.2d at 1382 (quoting **United States v. Bommarito**, 524 F.2d 140, 143-44 (2d Cir. 1975)).

Accordingly, the district court's denial of Rivera's motion to correct an illegal sentence is **AFFIRMED**.

